

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 332 OF 2020

ABDALA BREK SAID.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXESRESPONDENT

RULING

Background

1. The Applicant is a tax payer registered with KRA PIN Number A000182412R.
2. The Respondent is a principal officer appointed under the Kenya Revenue Act for purposes of collection and accounting of Government Revenue and related purposes.
3. The Respondent issued VAT assessment on 15th November 2019 for the period January 2018 to May 2018. The Applicant objected on 4th December 2019 and subsequently the Respondent issued its Objection Decision on 7th February 2020.
4. The Applicant being dissatisfied with the Respondent's decision filed this Notice of Motion dated the 30th day of July, 2020 seeking the following orders:

- a. THAT this application be certified as urgent and in view thereof service be dispensed with in the first instance.
- b. THAT this Honourable Tribunal be pleased to enlarge time within which the Applicant is to file his Notice of Appeal, Memorandum of Appeal, Statement of Facts, and Tax Decision.
- c. THAT the annexed draft Notice of Appeal, Memorandum of Appeal, Statement of Facts, and Tax Decision be deemed to have been properly filed within time.
- d. THAT the Applicant be at liberty to apply for further orders and the Honourable Tribunal do give any and/or any directions it deems fit and just to grant in the circumstances.
- e. The costs of this application be in the cause.

Grounds for Application

5. The application was supported by an Affidavit sworn by the Applicant on the 30th day of July , 2020 and is premised on the following grounds:-
 - a) THAT the statutory timelines within which the Appellant is supposed to have submitted his Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax Decision has since lapsed.

- b) THAT the Applicant/Appellant had objected to the additional assessment issued by the Respondent and did not receive any response within the statutory time provided pursuant to the Tax Procedures Act 2015.
- c) THAT all this time the Applicant/Appellant who is resident of Mombasa believed that the objection had been allowed.
- d) THAT the Country was hit by Covid-19 pandemic and in March 2020, the President issued a cessation of movement in Mombasa County thereby communication was hampered.
- e) THAT it is not until 20th July 2020 that the Applicant/Appellant received the Confirmation Assessment Notices and on perusal, noted that they were dated the 7th February 2020.
- f) THAT failure to file a Notice of Appeal and Memorandum of Appeal within time was not occasioned on his part but was occasioned by lack of proper communication between the Appellant and the Respondent.
- g) THAT the cessation of movement having been lifted, the Appellant is logistically able to approach and consult a Tax Agent, KRA offices and the Tax Appeals Tribunal with ease.
- h) THAT the Respondent will not suffer any prejudice if the orders sought herein are granted.

- i) THAT in the interest of justice, fairness, and fair play, it is only fit to grant the orders sought to allow the hearing and determination of the Appeal on merit.

Grounds for Opposition

6. The Respondent opposed the application by filing Grounds of Opposition dated the 18th day of August, 2020 citing the following grounds:

- a) THAT this application has been brought in bad faith and premised on falsehood.

- b) THAT the application herein is similar in words and reasons with that of:

- i. TAT No. 331 of 2020: Basit Properties Limited V Commissioner of Domestic Taxes; and

- ii. TAT No. 332 of 2020 Abdalla Brek Said V Commissioner of Domestic Taxes.

- c) THAT the basis of three unique applications cannot be word by word similar and the same is merely a copy and paste of the other and therefore only aimed at swindling the Respondent and the Tribunal.

- d) THAT the Objection Decisions attached herein were issued on 24th January 2020, and 30th January 2020 and another on 7th February 2020 and was forwarded via the Applicant's iTax email address.
- e) THAT pursuant to Section 12 and 13 of the Tax Appeals Tribunal Act No. 40 of 2013, a person who disputes the decision of the Commissioner on any matter arising under the provisions of any law, may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal within thirty days upon receipt of the decision of the Commissioner.
- f) THAT the Applicant was supposed to file the Notice of Appeal on 23rd February 2020, 29th February 2020 and 6th March 2020, respectively and the Memorandum of Appeal on 29th February, 2020, 13th March, 2020 and 20th March 2020, respectively.
- g) THAT it is judicial notice that the first Covid-19 case was reported on 13th March 2020.
- h) THAT it is also judicial notice that the restriction of movement in and out of Nairobi and Mombasa County were first imposed on 6th April 2020 by which time the Applicant ought to have filed the Notice of Appeal, Memorandum of Appeal and Statement of Facts.

- i) THAT the application is premised on the grounds that the delay is premised on COVID-19 pandemic restriction of movement which occurred way after their time lapsed.
- j) THAT further during the period under consideration both the Tax Appeals Tribunal and the Respondent were receiving electronic copies of documents and Appeals and hence the Applicant has failed to explain why they did not use this mode of filing and service.
- k) THAT on 18th March 2020, the Honourable Tribunal issued a notice that *“with effect from 19th March 2020, parties with matters before the Tax Appeals Tribunal would not be allowed entry into the TAT Registry. All the Documents including Notice of Appeal and Memorandum of Appeals, Statement of Facts, Submissions, Urgent Applications and filing of fees deposit slips shall be forwarded to taxtribunalcbc@gmail.com and for further clarification, the Taxpayers were encouraged to contact the secretariat staff on Mobile nos. 0706-633056, 0713-927918, 0723-428366 and 0729-800505”*.
- l) THAT from the Notice issued to the Applicant on 31st January 2020, it was evident that the parties previously communicated via email as the Applicant cannot now feign ignorance of the Notices previously issued.

- m) THAT if indeed the Appellant had challenges in filing the Notice of Appeal on or before 6th March 2020, when the same was due, the Appellant ought to have contacted the Commissioner's appointed Officer as captured in the Appellant's Objection Decision as well as the Honourable Tribunal as clearly stated in in Paragraph K herein above.
- n) THAT the applications in the three matters are copy paste of each other clearly showing Taxpayers who are undeserving of the discretion of the Tribunal.
- o) THAT the three applications are coloured with dishonesty and drafted only to appease the mercy of the Honourable Tribunal.
- p) THAT the Honourable Tribunal can only exercise its discretion on deserving litigants and the three Applicants in the matters herein having not disclosed the reasons for the delay and opted to defraud and swindle the Tribunal and are undeserving of any such mercy.
- q) THAT Section 13(4) of the Tax Appeals Tribunal cannot be invoked in favour of conniving Taxpayers as the case herein.
- r) THAT the applications herein are mischievous, incompetent, and bad in law.
- s) THAT the Applications are an abuse of the Tribunal and should be dismissed.

ANALYSIS AND FINDINGS

7. The Appellant submitted that the delay in filing his Notice of Appeal was occasioned by the circumstances that were beyond his control. In particular, the Appellant averred that he did not receive the confirmed assessment dated 7th February 2020 which he claimed to have received on 20th July 2010 via his email. The Appellant submitted that the delay was not occasioned on his part but was occasioned by lack of proper communication between the Appellant and the Respondent.
8. The Respondent in opposing the application argues that the Applicant's delay was not caused by extraneous circumstances and that the Appellant was merely being mischievous in his averments.
9. Section 13 of the Tax Appeals Tribunal Act in granting the Tribunal discretion to extend time provides that:
*“(3) The Tribunal may, upon application in writing, extend the time for submitting the documents referred to in subsection (2).
(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from giving notice of appeal within the specified period.”*
Consequently, the Tribunal is required to determine the length and reason for the delay when determining the extension of time to appeal out of time.

It is noted that the power to extend time is discretionary and unfettered but the same must be exercised judiciously.

10. The Tribunal notes that the Applicant ought to have filed his Notice of Appeal on or before 6th March 2020 given that the Objection Decision was issued on 7th February 2020. The Applicant has filed the Notice of Motion on 6th August 2020 which is five (5) months late.

11. In determining whether to extend time, the Tribunal was guided by the court in **Joseph Ondiek Tumbo v Sony Sugar Co Ltd [2014] eKLR**, where the learned Judge quoted Sir Thomas Bingham M R in **Costellow V Somerset County Council (1993)1 All ER 952** where he stated that:

“The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.... Further, an extension of time is an indulgence from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is

that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

12. Exercise of discretion to extend time is a well beaten path. In **Wasike V Swala [1984] KLR 591** the Court laid a hierarchy of factors to consider when it stated that

“an applicant must now show, in descending scale of importance, the following factors: - a) That there is merit in his appeal. b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and c) That the delay has not been inordinate.”

13. The Tribunal, guided by the principles set out in **Wasike V Swala [1984] KLR 591**, **Joseph Ondiek Tumbo v Sony Sugar Co Ltd [2014] eKLR** and **Section 13 of the Tax Appeals Tribunal Act 2013** used the following criteria to consider the application.

- a. The merits of the complained action.

- b. Whether there will be prejudice suffered by the Respondent if the extension is granted?
- c. Whether the Application for extension has been brought without undue delay?
- d. Whether there is a reasonable cause for the delay?

a. The merits of the complained action

- 14. Under this test, the Tribunal examined whether the matter being complained of was material to extent that it deserved a day before the Tribunal or whether it was a frivolous one that would lead to a waste of the Tribunal's time.
- 15. The test is not whether the case is likely to succeed. Rather, it is whether the case is arguable. This was the finding in **Kenya Commercial Bank Limited Vs Nicholas Ombija (2009) eKLR** where it was held that:

“ an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.”
- 16. The dispute involves a disputed VAT liability for the period January 2018 to May 2018. The Applicant claimed that the amount assessed was excessive and that it had the evidence to prove so. The Tribunal finds that the dispute is not frivolous and should be heard on its merits.

b. Whether there the Appellant will suffer prejudice if the extension is granted?

17. The Respondent did not demonstrate how it would suffer prejudice if the prayer for expansion of time was granted. On the other hand, the Appellant's recourse to justice lies in an appeal to the Tribunal. Thus, the Appellant would suffer prejudice if it is not granted leave to file its appeal. It is the view of the Tribunal that the Respondent would still collect the taxes together with penalties and interest should the Applicant be found to be at fault. The Tribunal therefore finds that the Respondent will not suffer prejudice if the extension is granted.

c. Whether the Application for extension has been brought without undue delay?

18. The Applicant averred that it is was not until 20th July 2020 that the it received the Confirmation Assessment Notices and on perusal, noted that they were dated the 7th February 2020. The Tribunal takes judicial notice that that a significant part of the time that lapsed was within the period of cessation of movement in and out of Nairobi and Mombasa due to the Covid-19 pandemic. The Tribunal also takes judicial notice that during this period, most service providers were offering limited services during that time. The Tribunal notes that the Application was submitted soon after the movement restrictions were

relaxed. We therefore find that the delay in the filing of the application for extension was not inordinate.

d. Whether there is a reasonable cause for the delay?

19. In considering what constitutes as a reasonable reason for delay, the court in *Balwant Singh v Jagdish Singh & Ors (Civil Appeal No.1166 of 2006)*, held that:

“The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention”

20. The Applicant argued that the delay was occasioned by circumstances that were beyond its control. According to the Applicant, he did not see the confirmed assessment sent to his iTax email on time. He further alleged that due to Covid-19 pandemic that led to issuance of cessation of movement in Mombasa County communication was hampered and was only able to approach and consult a Tax Agent, KRA offices and the Tax Appeals Tribunal with ease upon lifting of the orders.

21. The Respondent on the other hand argued that the reason given by the Applicant was invalid and that the Applicant was being mischievous. It argued that the parties previously communicated via email and the Applicant cannot now feign ignorance.

22. The Tribunal notes that the Applicant ought to have filed his Notice of Appeal on or before 6th March 2020 given that the Objection Decision was issued on 7th February 2020. The Applicant filed the Notice of Motion on 6th August 2020 which is five (5) months late. The Tribunal further agrees with the averments by the Respondent to the effect that the issue of Covid-19 happened after the expiry of the Applicant's window to file his Notice of Appeal.
23. The Tribunal notes that the Applicant gave two reasons for its failure to file its appeal on time. The first was the cessation of movement imposed as a result of the Covid-19 pandemic. In this regard, the Tribunal is inclined to agree with the Respondent. Indeed, the period within which the Applicant could file its appeal had already lapsed by the time the cessation of movement was imposed. Secondly, the Applicant averred that it did not see the Respondent's email until sometimes in July, 2020. Unfortunately, the Applicant has not provided any reasons for this. In the Tribunal's view, the Applicant ought to have provided evidence this delay in accessing its email was not occasioned by a failure on its part to exercise due diligence and attention. As it stands, the Applicant has merely averred this and has not provided any reason why this is the case.
24. This notwithstanding, the Tribunal is of the view that denying the Applicant his day in court is deny him access to justice. In reaching this finding, the

Tribunal is guided by the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 which provides that justice should be administered without undue regard to procedural technicalities.

25. Consequently, the Tribunal exercised its discretion and allows the application for leave extended the time to file the Appeal out of time.

Orders of the Tribunal

26. After considering the submissions of both parties and the documents supporting the Notice of Motion the Tribunal Orders that:

- i. Leave be and is hereby granted for the Appellant to file its Notice of Appeal, Memorandum of Appeal, Statement of Facts and the Tax decision out of time.
- ii. The Notice of Appeal, Memorandum of Appeal, Statement of Facts and the Tax decision filed before the Tribunal with the application on the 6th day of August 2020 are deemed as duly filed and the Appeal to accordingly proceed to full hearing.
- iii. The Respondent to file its Response within 30 days of the date of this Ruling.
- iv. Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 11th day of September, 2020

**ERIC N. WAFULA
CHAIRMAN**

**NGINA MUTAVA
MEMBER**

**WILFRED N. GICHUKI
MEMBER**

**ABRAHAM K. KIPROTICH
MEMBER**

**GABRIEL M. KITENGA
MEMBER**